

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARTA RENEE STEINMETZ, DECEASED

Claimant

V.

UNITED PARCEL SERVICE

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

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) Docket No. 1,009,382
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ORDER

Claimant's counsel requested review of the August 14, 2014, Order by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on December 17, 2014.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ dismissed the review and modification action after determining claimant's counsel failed to serve a suggestion of death upon the record and a motion for substitution of the proper party within a reasonable time, as required by K.S.A. 60-225(a)(1).

Claimant's counsel appeals, arguing opposing counsel and the court were properly notified of claimant's death and the motion for substitution was filed within a reasonable amount of time after the notice was given, therefore the action should not have been dismissed. Claimant's counsel contends this court is not bound by the technical rules of procedure and the rules should be liberally construed in favor of the worker. Therefore,

to dismiss this action for a technicality would not be in line with this policy. Claimant's counsel requests the dismissal be overturned.

Respondent argues the ALJ's Order should be affirmed. Respondent contends the ALJ was within his authority to use to the Rules of Civil Procedure to dismiss the case because claimant died four years prior to the substitution of party being filed and two years after claimant's counsel was notified of her death, both of which are clearly not within a reasonable amount of time. Respondent also noted that claimant had filed bankruptcy and the automatic stay should prohibit any action in this matter pending a release from the stay.

Claimant's counsel submits the following in its brief to the Board:

- I. The dismissal was made under the Kansas Rules for Civil Procedure and not made under the Workmen's Compensation Act as is usually required.
- II. Even if this Court does hold that a workmen's compensation case could be dismissed under K.S.A. 60-225(a), *Belk* does not give authority to dismiss an action for failing to appropriately file a suggestion of death which was the issue here.
- III. Even if this court determines that K.S.A. 60-225(a) does give it authority to dismiss the action for failing to appropriately file a suggestion of death, it should not do so because provisions of the Workmen's Compensation Act are to be liberally construed in favor of the worker and this court is not to be bound by technical rules of procedure."¹

FINDINGS OF FACT

TIMELINE

3/5/03 -- Application for Hearing (E-1) filed for a series of traumas from approximately October 2002 to Present to claimant's bilateral upper extremities. The source of these traumas was indicated to be repetitive pushing, pulling and lifting work activities.

6/24/04 -- Application for Preliminary Hearing (E-3) filed.

8/18/04 -- Preliminary Hearing held - regarding medical for the right elbow.

¹ Claimant's Brief (filed Sept. 16, 2014) at 1-2.

8/19/04 -- Respondent ordered to pay for treatment of claimant's right elbow with Lanny Harris, M.D.

8/27/04 -- Claimant's last day worked.

11/23/05 -- Prehearing Settlement Conference.

11/28/05 -- ALJ Hursh enters Order sending claimant for an IME with Brian Divelbiss, M.D., to specify if impairment is to one upper extremity or both. Dr. Divelbiss entered in his report on January 17, 2006, and the Division received it on February 2, 2006.

4/27/06 -- Regular hearing was held.

7/24/06 -- Respondent filed a Motion to Quash claimant's notice of deposition.

7/26/06 -- Motion Hearing held on Motion to Quash a deposition.

7/27/06 -- ALJ entered an Order quashing claimant's motion.

10/16/06 -- Respondent files submission letter.

10/16/06 -- Parties enter stipulation related to the essential job functions of claimant's position and that this list was provided for claimant's FCE and testing with Dr. Harris.

10/23/06 -- Claimant files submission letter

11/2/06 -- ALJ Hursh entered an Award giving claimant 27 weeks temporary total disability compensation and a 70 percent permanent partial general disability.

11/7/06 -- Respondent appeals to the Board.

5/31/07 -- Board enters the decision modifying the award to two scheduled injuries -- 28 percent to the right upper extremity at the shoulder and 22 percent to the left upper extremity at the forearm.

6/29/07 -- Claimant appealed the Board's Order to the Court of Appeals.

7/28/08 -- An Application for Review and Modification, signed by claimant's counsel, was filed noting Social Security determined claimant was permanently and totally disabled and stating she was seeking an increase in her disability award.

9/12/08 -- The Court of Appeals affirmed the Board's May 31, 2007, Order.

5/27/10 -- Claimant died. The death certificate indicates claimant died in the hospital of complications from acute drug (opiates) intoxication. This was considered to be an accidental overdose of prescription medication. There was no indication this overdose was related to claimant's work injury.

Late 2011 or early 2012 -- claimant's counsel learned of claimant's death from Judith Hidalgo, a Social Security attorney.

November 2013 -- claimant's counsel learned claimant had children and he was able to establish contact.²

4/9/14 -- Prehearing Settlement Conference held. The parties agree to proceed to hearing on Review and Modification. Claimant's counsel also informed the ALJ and reported again to respondent's counsel of claimant's death in May 2010. Claimant's counsel supplied, via email on April 24, 2014, claimant's birth and death certificates.

8/1/14 -- Claimant's counsel filed Letters of Administration with the Clerk of the District Court of Wyandotte County, indicating Ian Estey, claimant's son, was appointed and qualified as Special Administrator of claimant's estate. The duties included to serve as the real party in interest as plaintiff in claimant's workers compensation claim and to sign any and all necessary pleadings and documents to prosecute a malpractice case or approve any settlement.

8/14/14 -- A Review and Modification Hearing was held. (10:06 a.m. to 10:36 a.m.) The Order of the ALJ dismissing the matter was vocalized at the hearing and in an Order (see below) also dated 8/14/14.

8/14/14 -- Claimant's counsel filed Suggestions of Death, notifying the Division of claimant's death.³

² At the Review and Modification hearing, claimant's counsel claims he was unaware claimant had children. However at claimant's February 3, 2004, Deposition, claimant testified under direct examination by respondent's counsel that, at the time, she had two children ages 21 and 19 and 1 granddaughter age three.

There is also a reference to claimant having two children in Respondent's Exhibit A of Dr. Truett Swaim's deposition. The evaluation and deposition were conducted at the request of claimant's counsel. There was another reference to claimant's two children and a grandchild on page 18-19 of Dr. Swaim's deposition.

³ Claimant's counsel argued Suggestions of Death were filed on a prior date. But no documents are contained in the record supporting this claim.)

8/14/14 -- Claimant's counsel filed Motion to Add or Substitute Ian Estey (claimant's son) as Personal Representative for claimant's estate.

8/14/14 -- ALJ Hursh entered an Order dismissing the review and modification action due to claimant counsel's failure to comply with the requirement of K.S.A. 60-225(a)(1).

8/20/14 -- Claimant's counsel appeals the ALJ's August 14, 2014, Order to the Board.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-514 (Furse 2000) states:

(a) Except as provided in subsection (b), K.S.A. 23-4,146 or the income withholding act and amendments thereto, no claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

(b) Claims for compensation, or compensation agreed upon, adjudged or paid, which are paid to a worker on a weekly basis or by lump sum shall be subject to enforcement of an order for support by means of voluntary or involuntary assignment of a portion of the compensation.

(1) Any involuntary assignment shall be obtained by motion filed within the case which is the basis of the existing order of support.

(A) Any motion seeking an involuntary assignment of compensation shall be served on the claimant and the claimant's counsel to the workers compensation claim, if known, the motion shall set forth:

- (i) The amount of the current support order to be enforced;
- (ii) the amount of any arrearage alleged to be owed under the support order;
- (iii) the identity of the payer of the compensation to the claimant, if known; and
- (iv) whether the assignment requested seeks to attach compensation for current support or arrearages or both.

(B) Motions for involuntary assignments of compensation shall be granted. The relief granted for:

(i) Current support shall be collectible from benefits paid on a weekly basis but shall not exceed 25% of the worker's gross weekly compensation excluding any medical compensation and rehabilitation costs paid directly to providers.

(ii) Past due support shall be collectible from lump-sum settlements, judgments or awards but shall not exceed 40% of a lump sum, excluding any medical compensation and rehabilitation costs paid directly to providers.

(2) In any proceeding under this subsection, the court may also consider the modification of the existing support order upon proper notice to the other interested parties.

- (3) Any order of involuntary assignment of compensation shall be served upon the payer of compensation and shall set forth the:
- (A) Amount of the current support order;
 - (B) amount of the arrearage owed, if any;
 - (C) applicable percentage limitations;
 - (D) name and address of the payee to whom assigned sums shall be disbursed by the payer; and
 - (E) date the assignment is to take effect and the conditions for termination of the assignment.
- (4) For the purposes of this section, "order for support" means any order of any Kansas court, authorized by law to issue such an order, which provides for the payment of funds for the support of a child or for maintenance of a spouse or ex-spouse, and includes such an order which provides for payment of an arrearage accrued under a previously existing order and reimbursement orders, including but not limited to, an order established pursuant to K.S.A. 39-718a, prior to its repeal; K.S.A. 39-718b, and amendments thereto; or an order established pursuant to the uniform interstate family support act and amendments thereto.
- (5) For all purposes under this section, each obligation to pay child support or order for child support shall be satisfied prior to satisfaction of any obligation to pay or order for maintenance of a spouse or ex-spouse.

Respondent raised the issue dealing with claimant's bankruptcy proceedings and the automatic stay associated with same. At oral argument to the Board the parties acknowledged claimant's bankruptcy had been discharged. Claimant's workers compensation benefits are exempt from any collection action, even in bankruptcy, pursuant to K.S.A. 44-514(a) (Furse 2000). Additionally, claimant's workers compensation benefits are exempt from any claim under the U.S. Bankruptcy Code.⁴

K.S.A. 60-201 (Furse 2000) states:

This article governs the procedure in the district courts of Kansas, other than actions commenced pursuant to the code of civil procedure for limited actions and governs the procedure in all original proceedings in the supreme court in all suits of a civil nature whether cognizable as cases at law or in equity, except as provided in K.S.A. 60-265, and amendments thereto.

K.S.A. 60-225 states:

(a) *Death of party. (1) Where claim not extinguished.* If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution must be made by any party or by the

⁴ See also 11 U.S.C.A. § 522 (d)(10)(C).

successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in K.S.A. 60-205, and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within a reasonable time after the death is suggested upon the record by service of a statement of fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) *Where right survives only to or against surviving party.* In the event the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Incapacity.* If a party becomes an incapacitated person, the court, upon motion served as provided in subsection (a) of this section, may allow the action to be continued by or against his or her representative as provided in K.S.A. 60-217(c).

(c) *Transfer of interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a) of this section.

(d) *Public officers --- death or separation from office.* When any public officer is a party to an action as such and during its pendency dies, resigns or otherwise ceases to hold office, the action may be continued and maintained for substitution. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If no successor is otherwise appointed or elected, the court in which the action is pending may appoint a successor for the prosecution or defense of the action.

(e) *Continued representation by attorney.* An attorney representing a party who dies or becomes an incapacitated person, or a public officer who dies or is separated from his or her office, in any action, may, in order to protect rights and avoid time limitations, continue such representation in the name of the original party until there has been a substitution therefor.

The Board must consider whether the provisions of Chapter 60 of the Kansas Statutes Annotated apply to workers compensation proceedings. The Kansas legislature has designated chapter 60 of the Kansas Statutes Annotated as controlling in the district courts of the state. There is no mention of any coverage over the Kansas Workers Compensation Act (Act), nor over any administrative hearing officer or judge in the division of workers compensation. Additionally, the legislature has designated the Act as the exclusive remedy for work-related accidents and injuries.⁵

⁵ See K.S.A. 44-501 (Furse 2000); K.S.A. 44-510d (Furse 2000) and K.S.A. 44-510e (Furse 2000).

The Workers Compensation Act has been held to be complete and exclusive within itself in establishing procedures covering every phase of the right to compensation. Such procedures are not subject to supplementation by rules borrowed from the Code of Civil Procedure.⁶ The Board finds the provisions of Chapter 60 of the Kansas Statutes Annotated are not applicable to matters brought pursuant to Chapter 44 unless specifically designated by the legislature or an appellate court. The dismissal provisions of K.S.A. 60-225 do not apply to a workers compensation proceeding.

Therefore, this matter is reversed and remanded to the ALJ for further proceedings consistent with this Order.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed and the matter remanded to the ALJ for a hearing on claimant's Application For Review and Modification.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 14, 2014, is reversed and remanded to the ALJ for proceedings as above ordered.

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁶ *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 566 P.2d 10 (1977).

CONCURRING OPINION

The dissent wants to apply the Code of Civil Procedure to a case covered by the Kansas Workers Compensation Act. Doing so is contrary to many appellate cases:

“The Work[ers] Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete and exclusive, and we must look to the procedure of the act for the methods of its administration. Rules and methods provided by the code of civil procedure not included in the act itself are not available in determining rights thereunder.”⁷

The dissent cites many cases for the general principle that the Code of Civil Procedure may supplement the Kansas Workers Compensation Act.

*Bushey*⁸ is distinguishable. In such case, the Director of Workers Compensation approved a temporary award in 1969 and a final award in 1971. The respondent argued such procedure was not permitted. While *Bushey* states “any procedure which is appropriate and not prohibited by the work[ers] compensation act may be employed,” the Supreme Court specifically noted the Director had statutory and administrative rule authority to rule as he did.⁹

In *Marley*,¹⁰ the concept of equitable estoppel was applied to a workers compensation claim. *Marley* does not concern the adoption of the Kansas Rules of Civil Procedure in a workers compensation case.

⁷ *Johnson v. Brooks Plumbing, LLC*, 281 Kan. 1212, 1214, 135 P.3d 1203 (2006). See also *Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, Syl. ¶ 3, 104 P.3d 378 (2005); *Sander v. State*, 278 Kan. 487, 492, 102 P.3d 1136 (2004); *Foos v. Terminix*, 277 Kan. 687, 695, 89 P.3d 546 (2004); *In re Doe*, 277 Kan. 795, 802, 90 P.3d 940 (2004); *Riedmiller v. Harness*, 29 Kan. App. 2d 941, 943, 34 P.3d 474 (2001) (“The statutory basis for applying the provisions of the Kansas Code of Civil Procedure to workers compensation appeals was removed by the legislature in 1993.”); *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

⁸ *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 515 P.2d 735 (1973).

⁹ *Id.* at 126-27.

¹⁰ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, rev. denied 269 Kan. 933 (2000).

*McIntyre*¹¹ is distinguishable. In fact, the Kansas Supreme Court in *Sander*¹² rejected the notion that either *Bain*¹³ or *McIntyre* provide general authority to deviate from the general rule against applying the Code of Civil Procedure to the Kansas Workers Compensation Act.

As for *Hernandez*,¹⁴ the parties disputed whether K.S.A. 60-234 and 60-237 were applicable to a Kansas workers compensation case. The Kansas Court of Appeals stated:

. . . K.S.A. 2007 Supp. 44-551(i)(I) extends to administrative law judges in workers compensation cases the power to “compel the attendance of witnesses and the production for books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state.” K.S.A. 44-549 extends these same powers to the director and the Board. Our Supreme Court has broadly construed these statutes to envision procedures in a workers compensation case parallel to that permitted by our code of civil procedure and to position an ALJ in a workers compensation case as having the supervisory authority equivalent to a district judge. See *Sebelius v. LaFaver*, 269 Kan. 918, 926-27, 9 P.3d 1260 (2000). There is no question that discovery procedures reflected in our code of civil procedure are available and enforceable in a workers compensation case, whether denominated pursuant to chapter 60 or otherwise.

. . .

As noted above, the ALJ and the Board have authority to compel production of documents to the same extent as a district court.¹⁵

Hernandez does not state, and the Kansas Workers Compensation Act does not state, that an administrative law judge or the Board has authority to dismiss a case for failure to make a suggestion of death or substitute a party.

¹¹ *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

¹² *Sander v. State*, 278 Kan. 487, 492, 102 P.3d 1136 (2004).

¹³ *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999).

¹⁴ *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347 (Kansas Court of Appeals unpublished opinion filed June 13, 2008).

¹⁵ *Id.* at *3-4.

*Abbey*¹⁶ states a court must have personal jurisdiction over a defendant before the court may enter a judgment. The Kansas Court of Appeals held the Board did not have personal jurisdiction over an Oklahoma insurance company that did not transact business in Kansas had did not have minimum contacts with Kansas to support personal jurisdiction over such out-of-state company. The Court noted neither K.S.A. 44-506 or K.S.A. 44-559 gave the Board jurisdiction. *Abbey* is not controlling.¹⁷

K.S.A. 44-501(a) shows the Division has jurisdiction to decide cases involving injuries arising out of and in the course of employment. K.S.A. 44-510c gives the Division jurisdiction to address whether a worker is permanently and totally disabled. K.S.A. 44-528 gives the Division authority to address claimant's request for review and modification of her award. Nowhere in the Act is there a requirement or rule concerning notification of death or substitution of a party following a party's death.

*Acosta*¹⁸ states:

. . . "Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency." *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998). Further, the Workers Compensation Act is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it. See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

As noted above, the Workers Compensation Act provides an explicit procedure which allows an ALJ, on a motion for review and modification, to modify an award for fraud by increasing or diminishing the compensation. K.S.A. 44-528(a). Nothing in the statute allows the ALJ to declare the award void ab initio, and according to the general rule regarding review and modification, the modification operates only prospectively. See *Ferrell*, 223 Kan. at 423. Where there is a complete and legislated procedure, there is no room for the ALJ to invoke the "inherent power" of the tribunal to declare an award void ab initio for fraud.

Following *Acosta*, we cannot manufacture authority where none exists, especially using a technical rule to preclude claimant's argument that she was permanently and totally disabled and entitled to review and modification of her award. K.S.A. 44-523(a) states:

¹⁶ *Abbey v. Cleveland Inspection Services, Inc.*, 30 Kan. App. 2d 114, 41 P.3d 297 (2002).

¹⁷ Interestingly, *Abbey* states without equivocation that rules of civil procedure do not apply to workers compensation cases. *Id.* at 117.

¹⁸ *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396, 44 P.3d 330 (2002).

The director, administrative law judge or board shall not be bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

As noted above, the Division of Workers Compensation has personal jurisdiction and subject matter jurisdiction to determine if claimant is permanently and totally disabled.

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in this matter. While it is acknowledged the Act is exclusive within itself, there are situations where the Act fails to cover specific situations requiring that a party or the administration go outside the Act.

In *Marley*¹⁹ the Kansas Court of Appeals allowed the application of the doctrine of equitable estoppel to apply to a workers compensation matter. The courts have also applied other provisions outside the Act in determining workers compensation matters; any procedure which is appropriate and not prohibited by the workers compensation act may be employed.²⁰ K.S.A. 60-206(a) provides the method for computing time periods prescribed under any law of the state, so long as another method for computing such time is not otherwise specifically provided.²¹ The discovery procedures reflected in our code of civil procedure are available and enforceable in a workers compensation case, whether denominated pursuant to chapter 60 or otherwise.²²

The Act has no provision for substituting parties when a claimant dies prior to the completion or extinguishment of a claim. This Board Member would find K.S.A. 60-225 applies in a workers compensation matter.

¹⁹ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, rev. denied 269 Kan. 933 (2000).

²⁰ *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 125, 515 P.2d 735 (1973).

²¹ *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

²² *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347 (Kansas Court of Appeals unpublished opinion filed June 13, 2008).

The undersigned also questions whether the Board had personal jurisdiction over the parties without the substitution having been requested and at least placed into motion. Here the claimant's counsel failed to file a statement noting the death of the claimant and also failed to request an order for the substitution of the proper party. The Workers Compensation Division had personal jurisdiction over both the claimant and respondent. However, personal jurisdiction over the claimant ceased at her death. The failure of claimant's heirs to enter an appearance or pursue the right to substitute as parties denies the Division jurisdiction over them as parties. A judgement rendered by a court without personal jurisdiction over a defendant is void, a nullity.²³ Here the statement noting death and the motion for substitution of parties were filed after the conclusion of the hearing wherein the ALJ dismissed the matter under K.S.A. 60-225. Failure of personal jurisdiction in this instance allows for only a dismissal of this matter.

BOARD MEMBER

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²³ *Abbey v. Cleveland Inspection Services, Inc.*, 30 Kan. App. 2d 114, 41 P.3d 297 (2002).